89- 1390

NO.

Supreme Court, U.S.
FILED
FEB 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1989

In the Matter of the Claim for COMPENSATION UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

THE LOUISIANA INSURANCE GUARANTY ASSOCIATION
Petitioners,

versus

NEIL ABBOTT, JR.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX VOLUME I

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APPENDIX A

In the Matter of the Claim for COMPENSATION UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT.

Neil ABBOTT, Jr.,

Plaintiff-Appellee

v.

LOUISIANA INSURANCE GUARANTY ASSOCIATION,

Defendant-Appellant.

No. 89-3021.

United States Court of Appeals,
Fifth Circuit.

Dec. 6, 1989.

Injured employee, whose order for compensation under the Longshore and Harbor Workers' Compensation Act remained unpaid, applied for and received from the deputy commissioner of the Department of Labor a supplemental order of default against state insurance guaranty association which had been ordered to pay benefits. Employee then petitioned to enforce guaranty association's payment of benefits. The United States District Court for the Eastern District of Louisiana, Henry A. Mentz, Jr., J., enforced the order, and the guaranty association appealed. The Court of Appeals, Clark, Chief Judge, held that: (1) District Court's scope of review in LHWCA enforcement proceedings did not include review of pro-

cedural sufficiency of original compensation order, and (2) LHWCA scheme providing carriers with postdeprivation review of compensation orders did not violate due process, absent showing that delay through appeal to Benefits Review Board was unwarranted or unreasonable.

Affirmed.

Before CLARK, Chief Judge, GEE and SMITH, Circuit Judges.

CLARK, Chief Judge:

I

The Louisiana Insurance Guaranty Association (LIGA) appeals from a district court judgment enforcing a Supplemental Order of Default against LIGA for the payment of worker's compensation under the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "Act"). 38 U.S.C.. §§901-950. LIGA contends that the district court should have declined to enforce the Supplemental Order of Default (Supplemental Order) because LIGA was denied due process in the issuance of the original Compensation Order on which the Supplemental Order is based. Because LIGA's due process claims will properly be considered by the Benefits Review Board of the United States Department of Labor (BRB), we affirm.

II.

Niel Abbott, Jr. (Abbott) was injured during his employment at Universal Iron Works, Inc. (Universal). Abbott received worker's compensation payments from Universal's insurer. Western Preferred Casualty Company (Western) until that company became insolvent. Compen-

sation then was paid by Universal itself, until it too became insolvent. The Western policy contained a "cut-through" endorsement requiring Early American Insurance Company (Early American) to pay Western's unpaid claims. However, Early American also became insolvent. Abbott received no further payments.

Abbott filed an administrative claim under the LHWCA against Universal and others for the unpaid benefits. Abbott later added LIGA as a party to the proceedings. LIGA was created by Louisiana Law to pay the claims of insolvent Louisiana insurers. Although Western is not admitted as an insurer in Louisiana and therefore does not come under LIGA's coverage, Early American is a Louisiana insurer. After conducting a hearing on Abbott's eligibility for benefits, the Administrative Law Judge (ALJ) entered a Compensation Order requiring LIGA to pay the benefits based on the Early American "cut-through" endorsement.

LIGA refused to pay and appealed to the BRB. LIGA insisted that it had been deprived of due process because it received inadequate notice of the administrative hearing and was not allowed to present its arguments for non-liability. LIGA also petitioned the BRB for a stay of the Compensation Order pending final resolution of its appeal. The BRB denied the stay because LIGA was unable to show that it would suffer irreparable harm. *See* 33 U.S.C. §921(b)(3).

Abbott subsequently applied for and received from the Deputy Commissioner of the United States Department of Labor (Deputy Commissioner) a Supplemental Order of Default against LIGA, based on the unpaid Compensation Order. Abbott then petitioned the district court under section 21(d) of the LHWCA to enforce LIGA's pay-

ment of the benefits. 38 U.S.C. §921(d).

The district court recognized that enforcement was inappropriate under section 21(d), because the Compensation Order was still on appeal to the BRB, and treated Abbott's petition as a petition for enforcement of the Supplemental Order under LHWCA section 18(a). 33 U.S.C. §918(a). The court concluded that the Supplemental Order had been issued "in accordance with law" as required by section 18(a) and entered judgment against LIGA. The court reasoned that its function in section 18(a) enforcement proceedings was limited to determining whether the Supplemental Order itself had been entered "in accordance with law" and that LIGA's challenges to the underlying Compensation Order were properly being considered by the BRB.

LIGA now appeals from the district court's order, contending that LHWCA section 18(a) and due process required the district court to review the procedural correctness of the underlying Compensation Order before enforcing the Supplemental Order. LIGA asserts that the district court should have declined to enforce the Supplemental Order because LIGA was denied due process in the issuance of the underlying Compensation Order. Because LIGA's challenge to the Compensation Order is properly before the BRB, we affirm.

III.

LIGA's arguments in this appeal are based partly on its asserted construction of LHWCA section 18(a) and partly on due process grounds. We will first consider LIGA's statutory contentions and then turn to LIGA's due process claims.

A. LHWCA Section 18(a).

[1] LIGA's first contention is that the district court's scope of review in LHWCA section 18(a) enforcement proceedings includes the procedural sufficiency of the original Compensation Order. LIGA asserts that the district court could not determine whether the Supplemental Order was "in accordance with law" as required by section 18(a), 33 U.S.C. § 918(a), unless the district court also reviewed the underlying Compensation Order for procedural errors. LIGA maintains that the Supplemental Order could not be "in accordance with law" if the underlying Compensation Order was issued in violation of LIGA's right to due process. We disagree.

Before the Deputy Commissioner can enter a supplemental order of default against an employer or insurance carrier under section 18(a), he must follow certain procedures. The Deputy Commissioner must investigate the claimant's application, provide notice of the claim to interested parties, and give the parties an opportunity for a hearing in the manner specified in section 19 of the Act. 33 U.S.C. § 918(a); *see id.* § 919. If there is no dispute about whether benefits are due under a compensation order or whether there has been a default in payments, the Deputy Commissioner must calculate the amount of the default and enter a supplemental order. *Id.* § 918(a), 919(e). At the claimant's request, the district court can then enforce the suppplemental order of default "if such supplementary order is in accordance with law." *Id* § 918(a). We conclude that a supplemental order of default is "in accordance with law" as required by section 18(a) if the Deputy Commissioner has correctly followed the procedures outlined above.

Section 18(a) was intended to provide a "quick and

inexpensive mechanism for the prompt enforcement and unpaid compenstion awards, a theme central to the spirit, intent, and purposes of the LHWCA." *Tidelands Marine Serv. v. Patterson*, 719 F.2d 126, 129 (5th Cir.1983). For this reason, we have held that supplemental orders of default are final when entered and are not appealable to the BRB. *Id.* Allowing review of underlying compensation orders in proceedings to enforce supplemental orders of default could cause additional delay and expense and frustrate Congress' intent to get compensation into the injured workers' hands as quickly as possible. *See Henry v. Gentry Plumbing & Heating Co.*, 704 F.2d 863, 865 (5th Cir.1983).

The legislative history of the statutes creating the BRB also supports this construction of section 18(a). Prior to the 1972 amendments to the Act, compensation orders were directly reviewable by the district court. *See Alford v. American Bridge Div. U.S. Steel Corp.*, 642 F.2d 86, 668 F.2d 791 (5th Cir.1981), *cert. denied*, 455 U.S. 927, 102 S.Ct. 1292, 71 L.Ed.2d 472 (1982). However, in 1972 Congress created the BRB to hear all direct appeals of compensation orders. This replaced the district court's exercise of that function. *See* H.R. Rep. No. 1441, 92nd cong. 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 4698, 4709. It would therefore be contrary to Congress' intent for the district courts to review the lawfulness of compensation orders in section 18(a) enforcement proceedings.

Congress has provided a comprehensive system of review for compensation orders. An aggrieved party may appeal a compensation order to the BRB and may petition the BRB for a stay of payments. 33 U.S.C. § 921(b)(3). The BRB also has authority to remand a case at any time during its review "for further appropriate action," such as additional findings. *Id.* § 921(b)(4); *see, e.g., Aerojet-General*

Shipyards, Inc. v. Smith, 647 F.2d 518, 521 (5th Cir.1981). The BRB's final orders are then appealable kto the United States Courts of Appeals, *Id.* § 921(c). The BRB and Courts of Appeals may review "any substantial question of law or fact," including procedural errors such as those asserted by LIGA. *Id.* § 921(b)(3); *sec, e.g., Aerojet-General Shipyards*, 647 F.2d at 525 (alleged denial of due process because of inadequate notice and opportunity to defend). Collateral review of compensation orders in section 18(a) enforcement proceedings is therefore unnecessary and would be contrary to the "spirit, intent, and purposes of the LHWCA." *Tidelands*, 719 F.2d at 129. We conclude that the district court's scope of review in section 18(a) enforcement proceedings is limited to the lawfulness of the supplemental orders of default and does not include the procedural or substantive correctness of the underlying compensation orders.

[2] In this case, once the BRB denied LIGA's motion for a stay of the ALJ's Compensation Order, the Deputy Commissioner had authority to issue the Supplemental Order of Default. *See* 33 U.S.C. §§ 918(a), 921(b)(3). LIGA did not argue in the district court that the Deputy Commissioner failed to provide notice of Abbott's application for a supplemental order or an opportunity for a hearing. Nor did LIGA assert that the Deputy Commissioner incorrectly calculated the default or failed to file the Supplemental Order and notify LIGA. While LIGA's counsel suggested at oral argument before this Court that the Deputy Commissioner may not have given LIGA notice and a hearing before entering the Supplemental Order, LIGA has not offered and proof that such omission substantially prejudices its rights. *See Ka Fung Chan v. INS.* 634 F.2d 248, 258 (5th Cir.1981) ("proof of denial of due process in an administrative proceeding requires a showing of substantial prejudice"). We conclude that the Supplemental Order was

"in accordance with law" within the meaning of LHWCA section 18(a).

LIGA also argues that the Supplemental Order was not "in accordance with law" because it was not based on "an appealable prior compensation order that resolves the substantive rights of the parties." *Providence Washington Ins., Co. v. Director, Office of Worker's Comp. Programs,* 765 F.2d 1381, 1386 (9th Cir.1985). LIGA asserts that the Compensation Order did not resolve its substantive rights because the ALJ assured LIGA at the administrative hearing that he was only going to consider Abbott's entitlement to benefits and that LIGA's liability would be the subject of an additional hearing.

[3] We reject this contention. Despite what the ALJ may have said at the administrative hearing, the Compensation Order unambiguously states that LIGA is liable for the benefits. Thus, the Deputy Commissioner correctly concluded that "the payment of compensation [was] due under [an] award of compensation," and properly issued the Supplemental Order. 33 U.S.C. § 918(a). LIGA does not have the right to have its challenge to the lawfulness of the Compensation Order decided by the Deputy Commissioner. LIGA must address that challenge in its proceedings before the BRB.

B. Due Process.

LIGA next contends that due process requires that LIGA be afforded an initial, pre-enforcement check against compensation orders issued in violation of established procedural safeguards. LIGA asserts that the initial check should be provided by the district court in section 18(a) enforcement proceedings because the district court is the appropriate forum for the vindication of one's constitutional

rights. We disagree.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976) (*quoting Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)). This requirement generally means that a party must have the opportunity for a hearing before the government initially interferes with the party's protected property interest. *See Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985). The LHWCA provides for a full pre-deprivation hearing before an ALJ in cases where an injured worker's entitlement to benefits or an employer's or insurance carrier's liability is disputed. *See* 33 U.S.C. §§ 919(c) & (d).

However, when the government's interference with a property interests occurs not because adequate procedures are lacking in a statute or regulation, but because of the failure of the government's representatives to follow them, the demands of due process are satisfied if there is "some meaningful opportunity subsequent to the initial taking for a determination of rights and liabilities." *Parratt v. Taylor,* 451 U.S. 527, 541, 101 S.Ct. 1908, 1916, 68 L.Ed.2d 420 (1981), *overruled on other grounds, Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) (prison officials' negligent interference with protected interests does not constitute a "deprivation" for purposes of due process); *see also Ingraham v. Wright,* 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 1091), 1094 (5th Cir.1986). If so, the government's post-deprivation procedures "constitute all the process due." *Delahoussaye,* 788 F.2d at 1094.

[4] Such is the situation in this case. LIGA does not argue that the notice and hearing procedures established

by the LHWCA are inadequate. Rather, LIGA argues that the ALJ's failure to follow established procedures before entering the Compensation Order denied LIGA its right to due process. Therefore, we must determine whether the LHWCA provides "some meaningful opportunity" subsequent to the ALJ's decision for a determination of LIGA's rights and liabilities. We conclude that it does.

Congress has provided that challenges to the procedural or substantive correctness of compensation orders are to be tested preliminarily by appeal to the BRB and the motion for a stay. 33 U.S.C. §921(b)(3). The BRB is authorized to grant a stay of a compensation order if the responsible party would otherwise suffer "irreparable injury." *Id.* The BRB has authority to review any substantial question of law or fact concerning a compensation order, and the BRB"s final orders are appealable to the Courts of Appeals. *Id.* §§ 921(b)(3), 921(c).

This comprehensive scheme provides a meaningful opportunity for post-deprivation review. All of LIGA's due process claims can be asserted before the BRB and subsequently in this Court. All of the remedies sought by LIGA can be urged before the BRB and here. The BRB's power to stay compensation awards to prevent irreparable injury assures that post-deprivation review will be meaningful, because irreparable injury occurs only when post-deprivation remedies will be inadequate to make the aggrived party whole. *See Rivere v. Offshore Painting Contractors,* 872 F.2d 1187, 1191 (5th cir.1989); *cf. Interox v. PPG Industries, Inc.,* 736 F.2d 194, 202 (5th Cir.1984). Indeed, the primary justification for granting a stay is to preserve the decisionmaker's ability to render a meaningful decision. *Cf. Treasure Salvors, Inc. v. the Unidentified Wrecked & Abandoned Sailing Vessel,* 640 F.2d 560, 568 (5th Cir.1981). Therefore, the BRB, in denying LIGA's mo-

tion for a stay, has determined that LIGA will have the opportunity for meaningful review.

[5] Furthermore, the opportunity to petition for a stay provides a prompt, pre-enforcement check againsst mistaken ALJ decisions. While the BRB can only grant a stay to avoid irreparable injury, stay proceedings provide at least some opportunity to be heard before a compensation order or supplemental order of default is enforced. the fact that the BRB does not always conduct hearings on motions for stay does not change the result. Due process does not always require the opportunity for an oral hearing. *See, e.g., Mathews,* 424 U.S. at 345, 96 S.Ct. at 907. We conclude that the LHWCA provides LIGA the opportunity for meaningful review of the ALJ's alleged procedural errors.

[6] LIGA nevertheless contends that district court review of compensation orders in section 18(a) enforcement proceedings would provide a more effective check against procedurally incorrect ALJ decisions. Assuming, arguendo, that this assertion may be true, the appropriate inquiry is not whether district court review would be more effective, but whether due process requires such review. We conclude that it does not.

To determine whether LIGA has a constitutional right to additional pre-enforcement review of the Compensation Order, we must weigh the competing interests involved. *See Mathews,* 424 U.S. at 335, 96 S.Ct. at 903. The private interests at stake is LIGA's payment of worker's compensation pending BRB review. While LIGA's interest in the retention of its funds pending review is not as compelling as an individual's interest in continued employment, *see Laudermill,* 470 U.S. at 543, 105 S.Ct. at 1494, or the receipt of social security disability benefits, *see*

see Mathews, 424 U.S. at 340, 96 S.Ct. at 905, neither is this interest insignificant. There is also some risk that LIGA would be unable to recoup payments erroneously made. The employer and the insurance carriers involved in this case are insolvent, and obtaining reimbursement from the LHWCA Special Fund is uncertain because the Secretary of Labor's use of those funds is discretionary. *See B.S. Costello, Inc. v. Meagher*, 867 F.2d 722, 725 (1st Cir.1989). Review by the district court in section 18(a) enforcement proceedings could reduce the risk of erroneous payment, if the district court were able to review the ALJ's alleged procedural errors before enforcing the supplemental order of default.

On the other hand, the government has a significant interest in maintaining a quick and inexpensive mechanism for getting compensation into the hands of injured workers. This interest is "central to the spirit, intent, and purposes of the LHWCA" and is embodied in section 18(a) of the Act. *Tidelands*, 719 F.2d at 129. Recognizing the possibility of erroneous ALJ decisions, the LHWCA provides a comprehensive system of review, including the opportunity to petition for a stay. There is little risk that the BRB and this Court would uphold an erroneous compensation order against LIGA. In addition, the LHWCA itself represents a compromise between the interests of injured workers, who receive a certain and immediate recovery, and the interests of employers and insurers, who in turn receive "definite and lower limits on potential liability than would have been applicable in common-law tort actions for damages." *Potomac Elec. Power Co. v. Director, Office of Workers' Comp. Programs*, 449 U.S. 268, 281-82, 101 S.Ct. 509, 516-17, 66 L.Ed 446 (1980).

On balance, we find that LIGA's interest in obtaining additional pre-enforcement review of the underlying

Compensation Order is insufficient to outweigh the government's interest in maintaining a quick and inexpensive mechanism for placing compensation in the hands of injured workers. In this case, it is undisputed that Abbott is entitled to benefits, and there is little doubt that district court review of the Compensation Order would cause additional delay and expense. Moreover, there is substantial doubt that LIGA will be able to avoid ultimate liability for Abbott's benefits. *See Martin Lumber Partnership v. LIGA*, 534 So.2d 469 (La.Ct.App.1988), *writ denied*, 537 So.2d 1162 (La.1989)(LIGA liable for worker's compensation based on Early American "cut-through" endorsement); *Wilkerson v. Jimco, Inc.* 499 So.2d 1245 (La.Ct.App.1986) (same). We conclude that the procedures currently available to LIGA under the LHWCA are adequate to satisfy the demands of due process.

[7] LIGA's final argument is that it will be denied due process because of the inherent delay in BRB review proceedings. LIGA asserts that it can expect a three-year delay before the BRB renders its decision. We reject this contention.

It is true that at some point a delay in the opportunity for administrative and judicial review can amount to a denial of due process. *See Loudermill*, 470 U.S. at 547, 105 S.Ct. at 1496. However, the United Sstates Supreme Court has stated that a mere allegation of delay, without an explanation of why the delay is unreasonable, is insufficient to support a claim for denial of due process. *Id.* In this case, LIGA has merely asserted that it can expect a long delay in its appeal to the BRB, without explaining why the delay is unwarranted or unreasonable. Under these circumstances, we cannot conclude that the delay in the LHWCA review process amounts to a denial of due process. *See e.g., United States v. Batson*, 782 F.2d 1307, 1312

(5th Cir. 1986), *cert. denied*, 477 U.S. 906, 106 S.Ct. 3277, 91 L.Ed.2d 567 (1986) (four-year delay not a denial of due process under the particular circumstances).

IV.

The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-3021

D.C. Docket No. CA-88-4264-I

FILED
DEC 6 1989

In the Matter of the Claim for COMPENSATION UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT.

Neil ABBOTT, Jr.,

Plaintiff-Appellee,

v.

LOUISIANA INSURANCE GUARANTY ASSOCIATION,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

Before CLARK, Chief Judge, GEE and SMITH, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ISSUED AS MANDATE:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

December 6, 1989

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-3021

FILED
JAN 3 1990

IN THE MATTER OF THE CLAIM FOR COMPENSATION UNDER THE LONGSHORE AND HARBOR WORKERS' ACT

Plaintiff-Appellee,

NEIL ABBOTT, JR.,

versus

LOUISIANA INSURANCE GUARANTY ASSOCIATION,

Defendant-Appellant.

Received
JAN 4 1990

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

(January 3, 1990)

Before CLARK, Chief Judge, GEE and SMITH, Circuit Judges.

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ illegible
United States Circuit Judge

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
DEC 6 89

IN THE MATTER OF THE CLAIM FOR COMPENSATION DUE UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT, ET AL.

Civil Action

Number: 88-4264

Section: "I"

VERSUS

LOUISIANA INSURANCE GUARANTY ASSOCIATION

J U D G M E N T

Considering the Court's order and oral reasons of November 23, 1988,

IT IS ORDERED, ADJUDGED, AND DECREED that pursuant to 33 U.S.C. 918(a), judgment be and is hereby rendered in favor of the claimant, Neil Abbott, Jr., and against the defendant, Louisiana Insurance Guaranty Association for the amount declared in default by the Deputy Commissioner's Supplementary Order, to wit: THIRTY—NINE THOUSAND ONE HUNDRED SEVENTY-FIVE AND 49/100) $39,175.49) DOLLARS, plus interest at the rate of 7.5% pursuant to 28 U.S.C. 1961, said sum representing TWENTY-NINE THOUSAND ONE HUNDRED NINETY-NINE AND 39/100 ($29,199.39) DOLLARS in unpaid compensation for the

DATE OF ENTRY
DEC 6 1988

time period of September 15, 1986 through August 27, 1988, (101 6/7 weeks at $286.67 per week), plus FIVE THOUSAND EIGHT HUNDRED THIRTY-NINE AND 87/100 ($5,839.87) DOLLARS in additional compensation pursuant to 33 U.S.C. 914, plus FOUR THOUSAND ONE HUNDRED THIRTY-SIX AND 23/100 ($4,136.23) DOLLARS in additional compensation for the time period of August 28, 1988 through November 23, 1988 (14 3/7 weeks at $286.67 per week).

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all future installments of compensation are deemed to be in default if not paid on the date which they become due.

New Orleans, Louisiana, this 5th day of December, 1988.

/s/ illegible

UNITED STATES DISTRICT JUDGE

DATE	NR.	PROCEEDING
9-27-88	1	Petn for enforcement of order pursuant to 22 USC 921(d).
9-30-88	2	JUDG: ORDER that there be judg in favor of pltf & agst deft for $29,199.33 plus $5,839.87 addl compensation w/ int & costs. (HAMJR) 9-29-88 dktd 9-30-88. CLOSED
10-5-88	3	Opp of deft to petn for enforcement of order
10-4-88	2a	Mtn of deft & ORDERED that judg entered by this Court on 9/30/88 is VACATED, claimant shall file a mtn to enforce in sufficient time to be heard on 11/16/88 at 10am; FURHTER ORDERED that this matter be reopened & reinstated on the docket of this Seciton of the Court (HAMjr) 10/6/88 skrs 10/7/88.
11/14/88	4	Pltf's mtn & ORDER granting exped hrg on mtn to enforce; hrg set 11/23/88 at 10am bfr Judge (HAMjr) dktd 11/15/88.
11/15/88	5	Pltf's mtn to enforce order of default pursuant to 33 USCA 921 (d).
11/16/88	6	Mtn of La. Ins. Guaranty Assoc & ORDER granting leave to file suppl opp to pet for enforcement of order (HAMjr) 11/18/88 dktd 11/21/88.
11/21/88	7	Suppl opp by La. Ins. Guaranty assoc to pet for enforcement of order.
11/18/88	8	Mtn of La. Ins. Guaranty Assoc & ORDER allowing it to attach aff to its suppl opp to pet for enforcement of order

DATE	NR.	PROCEEDING
		(HAMjr) dktd 11/21/88.
11/23/88	9	Hrg on pltf's mtn to enforce order of default issd by deputy commissioner's office GRANTED; pltf is to submit a proposed judg w/in 5 days HAMjr) dktd 11/28/88.
12/6/88	10	JUDGMENT in favor of claimant, Neil Abbott, Jr. & agst Louisiana Ins. Guaranty Association for the amount declared in default by the Deputy Commissioner's Suppl Order, to wit: $39,175.49, plus interest at the rate of 7.54%, said sum representing $29,199.39 in unpaid compensation for 9/15/86 through 8/27/88, plus $5,839.87 in additional compensation, plus $4,136.23 in additional compensation for 8/28/88 through 11/23/88; FURTHER ORDERED that all future installmetns of compensation are deemed to be in default if not paid on the date which they are due (HAMjr) 12/15/88 dktd 12/6/88. CLOSED CASE
1/3/89	11	*Ntc of appeal* by deft of final judg entered on 12/5/88.
1/5/89	xx	Notice of Appeal forwarded to all parties. (dlm)
1/9/89	12	Transcript order by LIGA of proceedings held 11/23/88.
1/4/89	11a	Petn by deft and ORDER that allowing supersedeas bonds to be filed. (HAMjr) 1-12-89 DKTD 1-12-89.

DATE	NR.	PROCEEDING
1-12-89	13	Supersedeas Bond by LA Ins Guaranty Assoc and State Nat'l Fire Ins Co
1-12-89	14	Supersedeas Bond by LA Ins Guaranty Assoc and State Nat'l Fire Ins Co
1-24-89	15	TRANSCRIPT of proceedings held 11/23/88 bfr the Honorable Henry A. Mentz, Jr.

UNITED STATES DISTRICT
EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF THE CLAIM FOR COMPENSATAION DUE UNDER THE LONGSHORE AND HARBOR WORKER'S COMPENSATION ACT:	)	CIVIL ACTION
NEIL ABBOT, JR.	)	88-4264
VS.	)	
LOUISIANA INSURANCE GUARANTY ASSOCIATION	)	SECTION I

Transcription of the proceedings held on Wednesday, November 23, 1988, in the above-captioned cause, the HENRY A. MENTZ, JR., District Judge, presiding.

Reported by: Sally Kohn, CSR
Official Court Reporter
Section "I"

APPEARANCES OF COUNSEL

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COUNSEL FOR LOUISIANA
INSURANCE GUARANTY

Wednesday, November 23, 1988.

PROCEEDINGS

THE CLERK: Civil Action No. 88-4264, Neil Abbott, Jr. versus Louisiana Insurance Guaranty Association.

MR. ROSSI: Collins Rossi for the defendants, Louisiana Insurance Guaranty Association.

MR. ALLEN: Good morning, Your Honor. David Allen on behalf of Mr. Abbott who is here in the courtroom today.

THE COURT: All right, sir.

MR. ALLEN: Your Honor, we are here today on a motion to enforce a supplemental default judgment issued by the deputy commissioner's office pursuant to 3 U.S.C. 901(d).

I think it is pretty straightforward. I think this Court needs to look to see if supplemental judgment of default was entered pursuant to Administrative Law Judge's decision which was done pursuant to the regulations arising out of 3 U.S.C. 901, et seq.

THE COURT: We have read all the material that you and counsel have submitted and I have got my ruling here to read into the record. If there is anything extra that you would like to comment on before I read my ruling, go ahead.

MR. ALLEN: Your Honor, the only thing I would comment on is that the Court's jurisdiction in this matter

is if the judgment was entered pursuant to rules and regulations of Title 23. Other than that, I think we have addressed everything in the memorandum, voluminous memorandum concerning the merits of the case which to me should have been filed with the review board rather than this court.

THE COURT: We have prepared this in anticipation that either side is going to be interested in appealing it.

Do you want to add anything?

MR. ROSSI: Yes, Your Honor. Your Honor, I spoke with one of your clerks yesterday or the day before, Jamie, and I advised her *Tidelands Marine v. Patterson*, 719 F.2d 126, which is a Fifth Circuit case, and another case, *Providence Washington Insurance Co.*, 765 F.2d 1381. That's a Ninth Circuit case.

The case law is extremely clear. Although the plaintiff is claiming that he is enforcing the judgment of the director pursuant to Section 9, both that and Section 918 of the same Title, mandate that district court, the federal district court is to enforce the deputy commissioner when that order is filed or granted in accordance with the law. I think if you look at the hearing transcript, the liability of the Louisiana Insurance Guaranty Association was not going to be considered by the Administrative Law Judge at that time.

Subsequently the decision and order was rendered, casting the Louisiana Insurance Guaranty Associataion in judgment for compensation benefits.

LIGA was advised by the judge that the matter of their liability wouldn't even be considered.

Obviously, we have outlined our arguments as far as due process at being able to present our claim, whether or not afforded that opportunity.

We also were not afforded adequate notice of the hearing. I think we point out in our memorandum that the LIGA was advised of the hearing nine days beforehand. We attempted to move for continuance. As a practical matter, I think you will recognize that I don't think there is any attorney that can prepare a case in nine days.

But I think if the Court reviews the rulings in *Tidelands* and *Providence Washington Insurance Company*, they will find there were procedural defects in the Administrative Law Judge's judgment. For that reason, this Court should not enforce that judgment.

THE COURT: All right. This is a motion by petitioner, Neil Abbott, to enforce order pursuant to 33 USCA 921(d).

The Court finds the facts as follows: Plaintiff filed suit for a judgment pursuant to 33 USC 921(d) to enforce a compensation order. Plaintiff's motion is ambiguous in that it is unclear whether he is seeking to enforce the Supplemental Order of Default entered by the deputy commissioner or the Decision and Order of Administrative Law Judge Ben Walley.

Plaintiff was injured on January 11, 1983, while in the course and scope of his employment with Universal Iron Works.

Universal contracted with Western Preferred Casualty Company for workman's compensation insurance. Contained in the Western policy was a "cut-through"

endorsement wherein Early American Insurance Company allegedly agreed to asssume all obligations of Western in the event that Western became insolvent.

Universal, Western, and Early American are insolvent.

Western was not an insurance carrier admitted in Louisiana. Therefore, there would be no basis to make a claim against LIGA based on Western's policy. However, Early American was an admitted company so that LIGA's liability for Abbott's compensation depends on interpretation of the alleged cut-through endorsement.

On September 10, 1987, a formal hearing was held before the ALJ. In addition to Abbott, LIGA made an appearance. LIGA requested a continuance or, alternatively, severance of plaintiff's claim against it on the ground that it had not received notice of the hearing and was unable to present evidence on the complex issue of the cut-through endorsement. LIGA claimed that the only notice it received of the hearing was a phone call from the plaintiff's counsel approximately seven days prior to the hearing.

After lengthy discussion, the ALJ recognized that LIGA had insufficient time to prepare for the hearing, but decided to proceed with the hearing only on the issue of the claimant's entitlement to benefits from his employer, not LIGA.

The ALJ gave LIGA permission to leave the hearing. nevertheless, in his subsequent written decision, the ALJ determined that the claimant was entitled to benefits, noted that the employer and the employer's carrier had become insolvent, and then ordered LIGA to pay the claimant's compensation.

LIGA asked the Benefits Review Board to stay payment of benefits. The Benefits Review Board determined that LIGA would not suffer irreparable harm in being required to make payment because the Special Fund would cover any payments for which LIGA might later be determined not liable. Although the Benefits Review Board denied the stay, LIGA has not paid any benefits. LIGA is now appealing the decision of the ALJ pursuant to the regular appellant process.

Plaintiff filed this suit to enforce the Deputy Commissioner's Supplemental Compensation Order declaring LIGA in default. Under 33 USC 921(d), the district court has jurisdiction only to determine if a final compensation order has been made and served in accordance with the law and to command performance with such order.

Abbott has asked this Court to enjoin LIGA to pay his compensation benefits.

Now, the mover, Mr. Abbott, contends that contrary to LIGA's defense in this action, due process has not been offended. LIGA had the opportunity to seek a stay from the Benefits Review board. The stay was denied due to a lack of irreparable harm. LIGA has all avenues of appeal to the Benefits Review Board available to it to seek redress. Any monies LIGA will be required to pay pursuant to Section 921(d) and which the Benefits Review Board may later determine was not owed by LIGA will be recoverable from the Special Fund established by the Longshore Act.

LIGA's opposition is as follows: LIGA's defense regarding the cut-through endorsement was never addressed by the ALJ. LIGA did not receive notice of the hearing. LIGA appeared at the hearing only as the result of a phone

call from plaintiff's counsel approximately seven days prior to the hearing. LIGA did not have sufficient time to prepare the case regarding LIGA's defense of lack of coverage. LIGA does not contest the claimant's right to benefits from his employer.

The administrative Law Judge's comments at the hearing indicated that he recognized that LIGA did not have time to pay the claimant's compensation without any discussion of the cut-through endorsement issue. Therefore, LIGA was totally denied due process. At no time prior to the ALJ's decision was LIGA given the opportunity to present any evidence, written or oral, on the coverage issue, despite having made clear to the ALJ that it intended to defend.

Thus, the order claimant seeks to enforce in this court was not made in accordance with the law and the Court should not enforce the judgment in this case.

Therefore, LIGA moves in its opposition that the Court stay execution of, or any proceedings to enforce, the Administrative Law Judge's order.

Now, our analysis of this is as follows: Abbott purports to bring this motion to enforce pursuant to Section 921(d). It is unclear as to whether he is seeking to enforce the ALJ's order or the Deputy Commissioner's order; his motion asks that the Court enforce the Deputy Commissioner's order while his memorandum aks that ALJ's order be enforced.

According to Section 921(d), the district courts have power only to enforce final orders of compensation.

Section 921(a) provides: "A compensation order shall

become effective when filed in the office of the deputy commissioner, and unless proceedings for the suspension or setting aside of such orders are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter."

The review section referred to, section 921(b), provides for appeal to the Benefits Review Board. By appealing the ALJ's award of benefits to the Benefits Review Board, LIGA prevented the award from becoming final. Therefore, if Abbott is proceeding under Section 921(d), this Court lacks subject matter jurisdiction and the petition must be dismissed. See *Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663 (7th Cir. 1982); *Ingalls Shipbuilding Div. v. White*, 681 F.2d 275 (5th Cir. 1982).

The Court believes that plaintiff has mischaracterized this claim as one to enforce the Administrative Law Judge's order under Section 921(d), when in fact it should have been brought as a motion to enforce the Deputy Commissioner's Supplemental Order of Default under Section 918(a). Section 918(a) provides, "In case of default by the employer in the payment of compensation due under any award of compensation for a period of 30 days after the compensation is due and payable, the person to whom such compensation is due may make application to the deputy commissioner for a supplemental order declaring the amount of the default. Such supplemental order of the deputy commissioner shall be final, and the district court shall upon the filing of the copy enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with the law."

33 USC 918(a) provides, "The principal differences

between Section 918 orders and Section 921 orders are: (1) orders issued under Section 918, unlike Section 921 orders, are not appealable to the Board; (2) Section 918 orders are final when issued unlike Section 921 orders which do not become final until 30 days or, if appealed, after appeal; and (3) as a result, Section 918 supplementary orders can immediately be filed with the district court for enforcement. Citing *Providence Washington Insurance Co. v. Director, Office of Workers' Compensation Programs, United States Department of Labor*, 17 BRBS 135 at 137 (9th Cir. 1985).

Therefore, in recognition of the fact that the LHWCA is explicitly designed to encourage the prompt payment by employers of obligations under a compensation order notwithstanding the existence of an appeal, and the Section 918 is a quicker and less cumbersome mechanism for enforcing compensation awards than Section 921, the Court views this petition as an appeal from the Deputy Commissioner's Supplemental Order of Default pursuant to Section 918(a). See *Providence Washington Insurance*, and *Tidelands Marine Service v. Patterson*, 719 F.2d 126 (5th Cir. 1983).

Under Section 918(a), the Court must enter judgment in the amount declared in default by the Deputy Commissioner's Order if that Order is in accordance with law.

The due process violations that LIGA has argued to the Court relate to the ALJ's compensation order and the fact that it was entered without LIGA having had benefit of either oral or written argument.

Presumably, those same arguments have been asserted in LIGA's appeal to the Benefits Review Board.

LIGA has not offered any argument that the Deputy

Commissioner's Supplemental Order of Default is not in accordance with law, and the Court is aware of no facts or evidence which would support such an argument.

Therefore, the ruling of the Court is that the Court will grant Abbott's motion for enforcement and order that plaintiff submit a proposed judgment in accordance with the Deputy Commissioner's Order, including any installments on which LIGA has defaulted since the filing and service of the Deputy Commissioner's Order.

(Which concluded a portion of the proceedings.)

REPORTER'S CERTIFICATE

I, Sally Kohn, CSR, Official Court Reporter for the Eastern District of Louisiana, Section "I", certify that the above and foregoing contains a true and correct transcription of the proceedings held in the above-captioned cause.

/s/ Sally Kohn

SALLY KOHN, CSR
Official Court Reporter
Section "I"

APPENDIX C

U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005

In the Matter of		
NEIL ABBOTT, JR.		
Claimant	)	Case No. 87-LHC-22
against	)	OWCP No. 7-89268
UNIVERSAL IRON WORKS, INC.		
Employer		

NOTICE OF HEARING AND PRE-TRIAL ORDER

YOU ARE HEREBY NOTIFIED that a hearing in the above entitled claim will be held before an Administrative Law Judge of the U.S. Department of Labor, at Heritage Plaza, Suite 530, 111 Veterans Memorial Blvd., Metairie, LA on April 27, 1987 at 1:30 p.m.

It is ORDERED THAT Counsel, not later than 10 days prior to the hearing, accomplish the following:

1. Pre-mark and exchange exhibits. Each page of a multi-page exhibit is to be numbered. Exhibits should be marked: Claimant - "CX ____" and Respondent - "RX ____.

2. Exchange witness lists. Additional witnesses may be used only for good cause made known to the Court. If depositions are to be used, they should be promptly

scheduled and taken timely.

3. At the hearing, a date will be set for the filing of proposed findings of fact, conclusions of law and briefs pursuant to 29 C.F.R. §18.57(a).

4. A suggested form for STIPULATIONS is enclosed to counsel only.

Entered this 13th day of January, 1987, at Metairie, Louisiana.

/s/ Ben H. Walley

BEN H. WALLEY
Administrative Law Judge

SERVICE SHEET

Case Name: NEIL ABBOTT, JR.

Case No.: 87-LHC-22

Title of Document: NOTICE OF HEARING AND PRE-TRIAL ORDER

A copy of the above document was sent to the following:

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Houma, LA 70363

Universal Iron Works, Inc.
P. O. Box 9056
Houma, LA 70361

Lawrence Rogers
Director, OWCP

Donald Shire, Esquire
Associate Solicitor
Div. of Employee Benefits

ACME Reporting Company, Inc.

/s/ Patricia L. Van Dervort
PATRICIA L. VAN DERVORT
P/30

U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blve.
Metairie, LA 70005

In the Matter of		
NEIL ABBOTT. JR.		
Claimant	)	Case No. 87-LHC-22
against	)	OWCP No. 7-89268
UNIVERSAL IRON WORKS, INC.		
Employer	)	
and	)	
LOUISIANA INSURANCE GUARANTY ASSOCIATION	)	

ORDER ADDING LOUISIANA INSURANCE GUARANTY ASSOCIATION AS A PARTY RESPONDENT AND NOTICE OF HEARING

This case had been set for hearing on April 27, 1987. Prior to that time additional time was requested and the matter was continued by order of April 28, 1987. Additionally, a Motion to add Louisiana Insurance Guaranty Association (LIGA) as Respondent was filed into the record. The purpose of LIGA is to pay legitimate claims

where the insurance company is insolvent.[1] The Motion to add LIGA was based on the fact that Employer's compensation carrier, Western Preferred, had gone into liquidation. Western Preferred, however, was not admitted by the Commissioner of Insurance to do business in Louisiana. But it was alleged that Early American Insurance Co., a company that was authorized to do business in Louisiana, had assumed liability for any losses which Western Preferred would fail to play. It was then argued that in as much as Early American was also insolvent, LIGA was required to assume liability as compensation insurer to Employer herein and LIGA was, therefore, a proper party respondent.

The above-noted Motion was later supplemented with a copy of the insurance policy which covers the accident at issue in the case at bar. That policy contains a cut-through endorsement which reads as follows:

EARLY AMERICAN INSURANCE COM-

---

[1] La. Revised Statute 22:1376 states the purpose of LIGA as:

> The purpose of this Part is to provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policy holders because of the insolvency of an insurer, to assist in the detection and prevention of insurer insolvencies, and to provide an association to assess the cost of such protection among insurers.

And at Section 1382, the statute reads as follows:

> (1) The association shall:
> (b) Be deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent.

> PANY hereby agrees that in the event the WESTERN PREFERRED CASUALTY COMPANY fails to pay any loss which is payable under this policy. EARLY AMERICAN INSURANCE COMPANY shall become liable for the loss after receiving written notice and demand for payment from the insured. Any payment shall be subject to the terms and conditions of this policy.

This language is *identical* to that contained in the policy interpreted by the Court in *Wilkerson v. Jimco, Inc.* 499 So. 2d 1245 (La. App. 4th Cir. 1986)[2] There the Louisiana Fourth Circuit, under facts on all fours with those at bar, upheld the district court's decision declaring LIGA to be the guarantor or insurer of the plaintiff's claim against the Employer under La. R.S. 22:1376, *et. seq.* (*See* footnote 1, *supra*). In reaching its decision The Fourth Circuit noted that all inferences and ambiquities must be resolved in favor of coverage. *Wilkerson* at p. 1247, citing *Carney v. American Fire & Indemnity Co.*, 371 So. 2d 815 (La. 1979).

Finding the *Wilkerson* case controlling herein, the Motion to Add Louisiana Insurance Guaranty Company as a party Respondent is hereby GRANTED.

FURTHER, YOU ARE HEREBY NOTIFIED that a hearing in the above entitled claim will be held before an Administrative Law Judge of the U.S. Department of Labor, at Heritage Plaza, Suite 530, 111 Veterans

---

[2] In *Wilkerson*, an employee filed suit for worker's compensation against his employer, Jimco, Inc. and its insurer, Western Preferred. Western Preferred filed a Third Party Demand against LIGA based on the cut-through endorsement identical to the one contained in the policy covering the accident giving rise to the present litigation.

Memorial Blvd., Metairie, LA on Thursday, September 10, 1987, at 9:00 a.m.

It is ORDERED THAT Counsel, not later than 10 days prior to the hearing, accomplish the following.

1. Pre-mark and exchange exhibits. Each page of a multi-page exhibit is to be numbered. Exhibits should be marked: Claimant - "CX ____ and Respondent - RX ____."

2. Exchange witness lists. Additional witnesses may be used only for good cause made known to the Court. If depositions are to be used, they should be promptly scheduled and taken timely.

3. At the hearing, a date will be set for the filing of proposed findings of fact, conclusions of law and briefs pursuant to 29 C.F.R. §18.57(a).

Entered this 13th day of July, 1987, at Metairie, Louisiana.

/s/Ben H. Walley
BEN H. WALLEY
Administrative Law Judge

Metairie, LA
P/39

A-42

SERVICE SHEET

Case Name: NEIL ABBOTT, JR.

Case No.: 87-LHC-22

Title of Document: ORDER ADDING LOUISIANA INSURANCE GUARANTY ASSOCIATION AS A PARTY RESPONDENT AND NOTICE OF HEARING

A copy of the above document was sent to the following:

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Houma, LA 70361

Lawrence Rogers
Director, OWCP

Donald Shire, Esquire
Associate Solicitor
Div. of Employee Benefits

Reporting Company

/s/ Patricia L. Van Dervort

PATRICIA L. VAN DERVORT
P/36

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of

NEIL ABBOTT, JR.	:	KOWCP NO. 7-89268
Claimant	:	
	:	
VERSUS	:	CASE NO. 87-LHC-22
	:	
UNIVERSAL IRON WORKS, INC.	:	
	:	
Employer	:	

MOTION FOR CONTINUANCE OF HEARING

NOW INTO COURT, through undersigned counsel, comes the Louisiana Insurance Guaranty Association, which respectfully avers:

I.

In a telephone conference with counsel for the claimant on September 1, 1987 disclosed to undersigned counsel for the first time that this matter had been scheduled for hearing at 9:00 A.M. on September 10, 1987, at the Heritage Plaza, 111 Veterans Memorial Boulevard, Metairie, Louisiana. Undersigned counsel were not retained by LIGA in connection with this matter until July 13, 1987 and had no prior notice of the trial setting.

On information and belief the attorney copied by the Dept. of Labor with the notice of hearing, Judith Atkinson, was not acting as counsel for LIGA at the time notice was sent. Checking with Ms. Atkinson disclosed that neither she, nor her office, actually received the Notice of Trial. An

affidavit to this effect is being prepared.

2.

Undersigned counsel has a conflict on September 10. Court-ordered depositions in the matter of: "James G. Smith, Jr., et al, v. Tenneco Oil Company, et al, 34th Judicial District Court for the Parish of St. Bernard, Civil Action No. 51-625, Division "C" were previously scheduled. Accordingly, undersigned counsel is unavailable for trial on the date currently set for the hearing of this matter.

3.

Counsel for Abbott has indicated that he would oppose a continuance, but nonetheless, undersigned counsel is constrained to represent that a continuance is both necessary and appropriate.

4.

The continuance requested is appropriate because the time reserved for the preparation of this matter for trial (from July 13, 1987 to September 10, 1987) was insufficient to permit necessary discovery. The claims against LIGA raise complicated factual and legal questions.

On information and belief Abbot's employer, Universal Iron Works, is in bankruptcy (counsel for Abbott represented this to be so). Universal's insurer, Western preferred, is similarly defunct. The question raised by claimant as to the potential obligation of LIGA rests on a so-called "cut-through" endorsement in the Western Preferred policy wherein another insurance carrier, also bankrupt, Early American Insurance Company, allegedly

assumed the obligations of Western Preferred in the event that Western Preferred became unable to pay.

Western Preferred was not an insurance carrier admitted in the State of Louisiana. That there would be no basis to make claim against LIGA based on any policy of insurance issued by Western Preferred to Universal Iron Works.

Early American was an admitted company and the questions of LIGA's liability are based solely on the so-called "cut-through" endorsement. It will be argued that the fact that Early American was an admitted company and because the endorsement appears in the Western Preferred policy that Early American *issued* a policy (it did not) and that LIGA is thereby required to respond even though a non-admitted company actually issued the policy.

If LIGA can be obligated in this fashion (by the mere inclusion of an endorsement) Early American would, in effect, be permitted to end-run and circumvent the requirements of the Louisiana Insurance Code. This alleged endorsement "method" of obligating LIGA would give Western Preferred policyholders the benefit of LIGA protection without satisfying the requirements of the insurance code pertaining to: (1) obtaining approval of endorsements; (2) admission of carriers (authorization to underwrite Louisiana risks which require that the carrier meets certain financial standards); (3) notification to the guaranty fund by each admitted company of risks which might give rise to claims, and (4) payment of the required assessments by the admitted company to fund the LIGA. Thus, argument of claimant based on the endorsement raises complicated legal issues which have in no way been resolved, definitively or otherwise, by prior Louisiana decisions. The so-called *JIMCO* decision did not substantively

address the legal and factual issues raised by the cut-through endorsement except in the most cursory and unsatisfactory fashion and cannot be considered dispositive of these issues.

Discovery is necessary to address the factual questions raised by this scheme. For instance, did the Early American employee or agent who issued the endorsement have corporate authority to issue the endorsement? On its face it is hard to imagine a responsible corporate official having authority, or giving authorization, to so obligate Early American. It may well be discovered that the issuance of the endorsement was nothing more than an outgrowth of the attempted merger between Early American and Western Preferred. This merger was never approved and if the endorsement is found to be tied in to the merger agreement it may well be ineffective. Similarly, factual questions exist as to whether Early American ever received consideration for the obligations it allegedly assumed via the cut-through endorsement. What is clear is that if corporate authorization in the proper form does not exist and if consideration was not received the endorsement, even though it may appear in the policy, may be a nullity. It is clear that discovery is necessary for LIGA to be given a fair opportunity to address these issues.

These factual questions, and others, indentified through the legal research already undertaken by counsel for LIGA, must be addressed through fact discovery. Witnesses with the necessary knowledge must be identified from corporations which are no longer in business. Western Preferred and Early American were based in Colorado and Alabama, and on information and belief actions before the Courts of those states, may have bearing on the issues raised. This precise issue may already have been addressed in litigation in Colorado, Alabama, or in Early American's

principal place of business, Texas. Presumably, the only legal representatives of these insurance carriers are the liquidator, and discovery from them will be necessary to determine the location of the appropriate corporate records, followed by discovery from the persons involved in the merger and endorsement in question as disclosed by these records.

It is clear that a period of less than two months (from the date LIGA was originally added as a party to the trial date presently assigned) was insufficient to provide counsel representing LIGA a fair opportunity to identify the issues and legal questions, and conduct the discovery outlined. Since being assigned the file counsel for LIGA have been active in conducting research and performing its investigation. Even if LIGA, Atkinson and counsel herein had been aware of the trial setting assigned in July it would have been necessary then to request additional time to prepare this matter for trial.

Since the claims against LIGA raise complicated legal and factual issues LIGA respectfully submits that it is entitled to a reasonable period of time to conduct discovery and properly prepare this matter for trial. Therefore, it is respectfully submitted that the hearing presently scheduled for September 10 be continued and that a conference before this Honorable Court be convened to permit the re-scheduling of this matter with time sufficient to afford justice and fairness to all parties.

RESPECTFULLY SUBMITTED:

BAILEY & LEININGER

Original Signed By:
Christopher Kosciuk

CHRISTOPHER ROSCIUK
3445 N. Causeway Boulevard
Suite 801
Metairie, LA 70002
Telephone: (504) 833-8241
Attorneys for Louisiana Insurance
Guaranty Association

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 3rd day of September, 1987, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid.

ORIGINAL SIGNED BY:
CHRISTOPHER KOSCIUK

NEIL ABBOTT, JR. Claimant	*	Case No. 87-LHC-22
against	*	OWCP No. 7-89268
UNIVERSAL IRON WORKS, INC. Employer	*	

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

On this ____ day of September, 1987, before me, the undersigned Notary Public, duly commissioned and qualified in and for the parish and state aforesaid, personally came and appeared:

JUDITH R. ATKINSON,

an attorney, and being a resident of the lawful age of majority of the Parish of East Baton Rouge, State of Louisiana, who, being duly sworn, did depose and state:

Affiant declared that the law firm of Mathews, Atkinson, Guglielmo, Marks & Day represents the Louisiana Insurance Guaranty Association in Baton Rouge, Louisiana;

In early July, affiant was contacted by telephone by the attorney for the claimant, Neil Abbott, and was verbally advised that Judge Walley, Administrative Law Judge, had signed an Order permitting the Guaranty Association to be brought into the administrative law proceedings; affiant has reviewed her notes of that conversation and there

was no reference to or mention of any hearing date being assigned;

On July 9, 1987, affiant wrote to counsel for the claimant requesting a copy of the policy and a copy of any depositions taken, as well as copies of any medical. Affiant, at that time, advised counsel for the claimant that "this file will probably be assigned to an adjuster in New Orleans and a law firm in New Orleans to defend the issues insofar as the Guaranty Association is concerned."

Affiant further declared that in mid-July, 1987, the file was assigned to Dunlap-Morel and Associates, as the adjusters for the claim, and further that the claim was assigned to the law firm of Bailey & Leininger at approximately the same time;

On August 11, 1987, affiant wrote to counsel for the claimant advising that Chris Kosciuk with Bailey & Leininger would be handling the Department of Labor proceedings for the LIGA and also advising at that time that depositions would be scheduled in the near future;

At the end of July, 1987, affiant received a letter from counsel for the claimant, along with a copy of the policy, deposition, and medical records, however, there was no mention of any hearing date being assigned;

Affiant further declared that, at no time, either verbally or in writing, was affiant notified by counsel for the claimant of any scheduled hearing date; further, affiant has reviewed the file and gone through loose filing documents in her office and has no record of receiving a copy of any notice scheduling a hearing on September 10, 1987; affiant further declared that hearing dates are routinely put on affiant's calendar and her secretary's calendar as soon as

they are received, and that there is no reference on either calendar of any hearing in this file for September 10, 1987; affiant further declared that affiant's first notification regarding the hearing date was on September 3, 1987, when affiant received a call from Joseph Hirn with Dunlap-Morel and further a telephone call from Chris Kosciuk with Bailey & Leininger; those telephone calls on September 3, 1987, were the first notice, either verbal or written, to affiant that a hearing date had been, in fact, scheduled.

THUS DONE, READ AND SIGNED in Baton Rouge, Louisiana, this 3rd day of September, 1987.

WITNESSES:

/s/ Bobbie W. Upton

/s/ Judith R. Atkinson
Judith R. Atkinson

/s/ illegible

/s/ illegible
Notary Public

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges
Heritage Plaza, Suit 530
111 Veterans Memorial Blvd.
Metairie, LA 70005

Filed
Sep 1987

In the Matter of	)	
NEIL ABBOTT, JR.	)	
Claimant	)	Case No. 87-LHC-22
against	)	OWCP No. 7-89268
UNIVERSAL IRON WORKS, INC.	)	
Employer	)	
and	)	
LOUISIANA INSURANCE GUARANTY ASSOCIATION	)	

ORDER POSTPONING RULING ON MOTION FOR CONTINUANCE

This case was set for hearing on Sesptember 10, 1987. Louisiana Insurance Guaranty Association recently submitted a Motion for Continuance, the contents of which can be ascertained by reference thereto. Counsel for Claimant opposes such continuance. A telephone conference among all counsel of record was held on Friday, September 4, 1987, in an effort to resolve this matter. As per my directives during that conference it is hereby ORDERED that

the parties should report to the hearing as scheduled, that each party will be given the opportunity to present his position, and that a ruling on the Motion for Continuance is deferred until that time.

/s/ Ben H. Walley
BEN H. WALLEY
Administrative Law Judge

Dated: Sep 04 1987
Metairie, LA
P/39

SERVICE SHEET

Case Name: NEIL ABBOTT, JR.

Case No.: 87-LHC-22

Tiktle of Document: ORDER POSTPONING RULING ON MOTION FOR CONINUANCE

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LAWRENCE Rogers
Director, OWCP

Donald Shire, Esquire
Associate Solicitor
Div. of Employee Benefits

/s/ Patricia L. Van Dervort
PATRICIA L. VAN DERVORT

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
701 Loyola Avenue, Room 13032
New Orleans, Louisiana 70113

Office of Workers Compensation Programs
Division of Longshore and Harbor Workers' Compensation

Jul 20, 1988

File No: 7-89268
Re: Neil Abbott
INJ: 1/11½83
EMPLOYER: Universal Iron Works

Mr. Neil Abbott, Jr.
LIGA - Mr. Joseph Hirm, III.
David L. Allen, Esquire
Christopher Kosciuk, Esquire
Honorable Ben H. Walley

JUL 22 1988

Gentlemen:

The enclosed Decision and Order of the Administrative Law Judge is hereby served upon the parties to whom this letter is addressed. The decision was based on all of the evidence of record, including testimony taken at a formal hearing, and on the assumption that all available evidence has been submitted.

The transcript, pleadings, and compensation order has been dated and filed in the Deputy Commissioner's Office. Procedures for appealing are described on the back of this letter.

The employer/insurance carrier is hereby advised that if the order awards compensation benefits the filing of an appeal does not relieve that party of the obligation of paying compensation as directed in this order. The employer/

insurance carrier is also advised that an additional 20 percent is added to the amount of compensation due if not paid within ten days, notwithstanding the filing of an appeal, unless an order staying payments has been issued by the Benefits Review Board, U.S. Department of Labor, 1111 - 20th Street, N.W., Suite 757, Washington, D.C. 20036.

Sincerely,

/s/ Donnette S. Glenn
DONNETTE S. GLENN
Deputy Commissioner

Enclosure

U.S. Department of Labor
Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005
(504) 589-6201

In the Matter of	)	
	)	
NEIL ABBOTT, JR.	)	
Claimant	)	Case No. 87-LHC-22
	)	
against	)	OWCP No. 7-89268
	)	
UNIVERSAL IRON WORKS, INC.	)	
Employer	)	
and	)	
LOUISIANA INSURANCE GUARANTY ASSOCIATION	)	
	)	

APPEARANCES:

David L. Allen, Esq.
525 Park Avenue
Houma, Louisiana 70364
For the Claimant

Christopher Kosciuk, Esq.
Suite 801
3445 N. Causeway Blvd.
Metairie, Louisiana 70002
For the Employer/Carrier

Before: BEN H. WALLEY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, (hereafter referred to as the Act or LHWCA), filed by Neil L. Abbott, Jr. (Claimant) against Universal Iron Works, Inc. (Employer now alleged to be insolvent) and Louisiana Insurance Guaranty Association (LIGA), on behalf of the insolvent carrier for the Employer, Western Preferred Casualty Co., (Employer's Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for resolution. Pursuant thereto, notice of hearing was issued, a formal hearing was scheduled and held in Metairie, Louisiana.

STATEMENT OF THE CASE

LIGA appeared at the hearing through its counsel and requested that they be dismissed from this litigation on two grounds. The first being that they challenged the sufficiency of the notice that they received and the second due to a contractual defense at state law that may insulate them from liability vis-a-vis the insolvent carrier. This court denied the motion and ruled that LIGA had been served with a process in sufficient time to require time to participate in the hearing. It was apparent at the hearing that LIGA's position in this matter was focused on issues that were not properly determinable by this Court, and the LIGA had no serious challenge to make concerning the Claimant's rights to benefits from this Employer. Since this hearing is solely to determine the factual basis under

which the Claimant may be eligible for benefits under the Act, and applicable regulations, LIGA will have no authority to challenge, the factual determination of the Claimant's rights to benefits against this Employer.

The insolvent Employer and Carrier waived their right to appear and defend on the merits. After this was duly noted, this Court heard that Claimant's evidence and made the findings of fact that follow.

FINDINGS OF FACT

The Claimant graduated from high school in 1975, and attended one semester of college before entering the work force. He has worked as an "aviation lineman" at a local heliport, as a tacker at a ship fabrication facility and finally as a welder. Claimant was injured on January 11, 1983, while working on a modification of a fender on a vessel at dock side.

Claimant stated that he was lifting up on the part that he was welding on when his back popped.[1] Claimant testified that he earned $9.00 per hour and usually worked 40-45 hours per week. [Tr. 30]. His average weekly wage at the time of his injury was $429.79.

Claimant sought treatment from Dr. Mathern, a general practitioner. Dr. Mathern subsequently referred the Claimant to a group of specialists, Drs. Landry and Guidry, both of whom are orthopaedist. Subsequent CAT Scans and myelograms confirmed that the Claimant had a

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[1] "[afterwards] I couldn't straighten out. I was bent over. That's when my boss told me they were going to bring me to the doctor to get checked out." [Tr. 30].

herniated disc at the L-4 & L-5 level. [CS-1]. As of April 18, 1984, the Claimant reached maximum medical improvement. Claimant testified that he was advised by both of his treating physicians that he could not return to his usual occupation. [Tr. 36]. The nature of this work required heavy lifting, frequent climbing and working in awkward positions; activities which the Claimant was proscribed from engaging in. [Tr. 28]. Claimant was advised that he seek vocational rehabilitation and change his occupation to one of a sedentary nature. [Tr. 36]. Claimant enrolled in college, in August of 1984, after consultation with a vocational rehabilitation counselor, and chose medical technology as his major area of study. [Tr. 38].

Claimant was successfully completing his vocational training when the insolvency of the Employer and Employer's Carrier resulted in a termination of his disability compensation which in turn forced him to withdraw from school at a point when he had little more than a year to go until completion of his four year curriculum.

As of the date of this hearing all of Claimant's medical expenses have been paid, and he has received temporary total compensation from January 11, 1983 until July 21, 1985, at a comp rate of $286.67, for 131/6/7ths weeks for a total of $37,795.77, from the now insolvent Carrier. Claimant subsequently received comp from the Employer, at the same rate, until September 15, 1986, when the Employer became insolvent.

CONCLUSIONS OF LAW

In arriving at a decision in this matter, it is well settled that the fact finder is entitled to determine the credibility of the witnesses, to weigh the evidence, and to draw his own inferences from it, and he is not bound to ac-

cept the opinion or theory of any particular medical examiner. *Atlantic Marine Inc. and Hartford Accident and Indemnity Company v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981). At the outset it must be further recognized that all factual doubts must be resolved in favor of the Claimant. Furthermore, it has been consistently held that the Act must be construed liberally in favor of the Claimant. *Wheatley v. Adler*, 406 F.2d 521, (5th Cir.), *cert. denied*, 395 U.S. 921 (1969); *Voris v. Eikel*, 346 U.S. 328, 333 (1953).

The burden of proof of disability is generally upon the Claimant to establish the nature and extent of the disability. *Parris v. Eller and Co.*, 16 BRBS 252 (1984). This can be done by showing that the Claimant is no longer able to return to his usual employment because of a job related injury. Once Claimant has done this he has made a prima facie case that he is disabled. The burden then shifts to the employer/carrier to prove the existence of suitable alternative employment opportunities in the community. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981). The question of disability is not measured by physical condition alone. It is a social, economic and educational one as well. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968).

Claimant has shown that he sustained an injury while working in the course and scope of his employment with the named Employer. Furthermore, he has also shown that due to this injury his treating physicians have concluded that he is unable to return to his usual occupation. Claimant has also shown that he was, prior to the insolvency of the Employer and the Carrier, successfully pursuing vocational rehabilitation. I therefore conclude that the Claimant has more than met the required showing under *New Orleans (Gulfwide) Stevedores v. Turner*, supra., and that since the Employer/Carrier have waived their right to

appear and defend, there was no rebuttal of the Claimant's evidence. I further conclude that considering the Claimant's evidence, there is substantial proof offered by the Claimaint that he has suffered a total disability as a result of the injury of January 11, 1983. Since Claimant has shown that he was undergoing vocational rehabilitation and desires to return in order to complete it, and inasmuch as he requested only temporary total benefits until such time as he completes his college education in medical technology; I conclude that while he has reached maximum medical improvement as of April 18, 1984, in consideration of the foregoing, an award of temporary total benefits is in order. The foregoing award of benefits shall remain in effect until such time as it has been shown that there is a change of the Claimant's wage earnings capacity in accordance with Section 922 of the Act.

SUMMARY

After considering the evidence and argument on the merits of the above captioned matter, I conclude that following: first, that the Claimant suffered an injury while working within the course and scope of his employment; second, that the Claimant is entitled to temporary total disability compensation until there is a change in Claimant wage earnings capacity in accordance with Section 922 of the Act; and Finally, that inasmuch as it has been alleged that the Employer and the Employer's Carrier have both become insolvent and that LIGA has since been added as a party to this matter, and that their request for severance denied, they are ordered to pay compensation as described above and set out in the order below, and in accordance with La. Rev. Stat. 22:1376 *et seq.*

ORDER

It is therefore CONCLUDED and ORDERED that:

1. The Claimant has been and is suffering a temporary total disability since the date of his work related injury of January 11, 1983, and that the Claimant is entitled to a continuation of his temporary total compensation, the payment of which was halted as of September 15, 1986 at a comp rate of $286.67, until such time as he completes his vocational rehabilitation and there is a change in his wage earnings capacity;

2. LIGA shall pay for the arrerage in compensation due to the Claimant from September 15, 1986, the date of termination of compensation due to insolvency, until the date of service of this order, in a lump sum, plus interest on all sums determined to be due and owing at the rate provided by 28 U.S.C. 1961 and *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984); and shall subsequently continue to pay compensation as set out and in accordance with paragraph 2, and

3. An application for attorney's fees, filed in accordance with 20 C.F.R. §702.132, will be considered if filed within twenty (20) days of service of this order, with a copy serviced to counsel of the Employer/Carrier and LIGA who shall have ten (10) days from its receipt to make such objections it may have thereto, all according to 33 U.S.C. §928 of the LHWCA.

/s/ Ben H. Walley

BEN H. WALLEY
Administrative Law Judge

Dated: JUL 14 1988
Metairie, LA
P/52

CERTIFICATE OF FILING AND SERVICE

I certify that on July 20, 1988 the foregoing Decision and Order was filed in the Office of the Deputy Commissioner, Seventh District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Neil Abbott, Jr., 412 Hibernia Place, Houma, LA 70363
Claimant

Universal Iron Works - Insolvent
Employer

Western Preferred Casualty Co., - Insolvent
Insurance Carrier

David L. Allen, Esq. 525 Park Ave., Houma, LA 70364
Attorney for Claimant

Christopher Kosciuk, Esq. 3445 N. Causeway, Suite 801, Metairie, LA 70002
Attorney for Employer/Insurance Carrier

A copy was also mailed by regular mail to the following:

Judge Ben H. Walley, Office of the Administrative Law Judges, U. S. Department of Labor, Heritage Plaza, Suite 530, 111 Veterans Memorial Boulevard Metairie, Louisiana 70005.

Copy to:
LIGA
Mr. Joseph Hirm, III.
3456 Cleary Ave.,
Suite 305
Metairie, LA 70002

/s/ Donnette S. Glenn
DONNETTE S. GLENN

Deputy Commissioner
Seventh Compensation District
U. S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Progr.

RECEIVED
Sep 7 1988

U. S. DEPARTMENT OF LABOR
Employment Stantards Administration
Office of Workers' Compensation Programs
701 Loyola Avenue, Room 13032
New Orleans, Louisiana 70113

. . . . . .

In the matter of the claim for compensation under the Longshore and Harbor Workers' Compensation Act

NEIL ABBOTT, JR.
(Claimant)

VS

UNIVERSAL IRON WORKS, INC.
(Insolvent Employer)

WESTERN PREFERRED CASUALTY
(Insolvent Insuance Carrier)
LA. INS. GUARANTY ASSOC.
(LICA) (Carrier)

. . . . . .

SUPPLEMENTAL COMPENSATION ORDER

DECLARING DEFAULT

(33 USC 918)

CASE NO: 7-89169
ALJ NO: 87-LHCA-22
BRB NO: 88-2521

On July 20, 1988, the Decision and Order of the Honorable Ben H. Wailey, Administrative Law Judge was filed in the Office of the Deputy Commissioner. Said order is incorporated herein by reference in its entirety.

On July 20, 1988, the Decision and Order of the

Honorable Ben H. Walley, Administrative Law Judge was filed in the Office of the Deputy Commissioner. Said order is incorporated herein by reference in its entirety.

FINDINGS OF FACT

On July 29, 1988, the Benefits Review Board denied the motion of the LIGA to stay payments for failure to establish irreparable injury as required by 33 USC 921 (b)(3). Said order is incorporated herein by reference in its entirety.

Compensation has not been paid by the LIGA, as required by 33 USC 914(f), in accordance with the order of Judge Walley; demand has been made for a Supplemental Order Declaring Default by the claimant;

There being no factual dispute concerning the payment of compensation, it is determined that any further administrative hearing is not required *Tidelands Marine Service v. Patterson,* 719 F. 2d 126 (5th Cir. 1983); *Lauzon v. Strachan Shipping Co,* F. 2d (No. 83-4258, 5th Cir. 1985).

The amount of defaulted payments totals $29,199.39, as of August 27, 1988. This represents accrued compensation from September 15, 1986 through August 27, 1988, 101 6/7 weeks, at $286.67 per week.

The additional sum of $5,839.87 is due pursuant to section 914(f) of the Act (20% of $29,199.39), plus interest at the rate of 7.54% on all due but unpaid installments of compensation [rate of interest is provided by 28 USC 1961 and *Grant v. Portland Stevedoring Co.,* 16 BRBS 267 (1984)].

The liability for all payments of compensation continues at the weekly rate of $286.67 until further ordered.

Based upon the foregoing findings, the Deputy Commissioner makes the following:

DECLARATION OF DEFAULT

The Louisiana Insurance Guaranty Association, having paid no compensation, and in the absence of a stay order, is found to be in default as set forth herein above in the amount of $29,199.39 through August 27, 1988, plus additional compensation in the amount of $5,839.87, and interest at the rate of 7.54%. All future installments of compensation are deemed to be in default if not paid on the date which they become due.

Given under my hand this 6th day of

September, 1988, at New Orleans, LA

/s/ Donnette S. Glenn

DONNETTE S. GLENN

DEPUTY COMMISSIONER

SEVENTH COMPENSATION
DISTRICT

CERTIFICATE OF FILING AND SERVICE

I certify that on September 6, 1988, the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, Seventh Compensation District Office, and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the lasts known address of each as follows:

Neil Abbott, Jr., 412 Hibernia Place, Houma, LA 70363
CLAIMANT

La. Ins. Guaranty Assoc., c/o Mr. Gloria Husser, P. O. BOX 45098, Baton Rouge, LA 70895
La. Ins. Guaranty Assoc., c/o Joseph Hirn, III, Dunlap and Assoc., 3456 Cleary Ave., Suite 305, Metairie, LA 70002
INSURANCE CARRIER

David B. Allen, Esq., 525 E. Park Ave., Houma, LA 70364
ATTORNEY FOR CLAIMANT

C. Doug Wheat, Esq., 3445 N. Causeway, Suite 801, Metairie, LA 70002
ATTORNEY FOR EMPLOYER/INSURANCE CARRIER

/s/ Donnette S. Glenn
DONNETTE S. GLENN
DEPUTY COMMISSIONER
SEVENTH COMPENSATION DISTRICT

If any compensation, payable under the terms of an award, is not paid within ten (10) days after it becomes due, there shall be added to such unpaid compensation an amount equal to twenty (20) percent thereof. The additional amount shall be paid at the same time as, but in addition to, such compensation.

The date compensation is due is the date the Deputy Commissioner files the decision or order in his/her office.

Form LS-19a
June, 1987